92-No. 976

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

JOHN THOMAS LYNCH - - - - Petitioner

versus

UNITED STATES OF AMERICA - Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ARTHUR R. SAMUEL
BROADUS AND SAMUEL
1808 One Riverfront Plaza
Louisville, Kentucky 40202
(502) 587-6516
Counsel for Petitioner

December 2, 1992

WESTERFIELD-BONTE CO., 819 W. KENTUCKY-P.O. BOX 3251, LOUISVILLE, KY.

QUESTIONS PRESENTED

1. Whether the application of 18 U.S.C. §924(e)(1) and 18 U.S.C. §922(g)(1) was unconstitutional in this case because the factual situation was too remote to an interstate transaction?

2. Whether the application of 18 U.S.C. §924 (e)(1) and 18 U.S.C. §922(g)(1) was unconstitutional in this case because it denied the Petitioner equal protection under the law?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Authorities	iii
Opinions Below	1
Jurisdiction	2
Constitutional Provisions Involved	2
Statement of the Case	2–3
Reasons for Granting the Writ	3–6
Conclusion	6
Certificate of Service	7
Appendix	1a–6a

TABLE OF AUTHORITIES

	PAGE
Cases:	
Gibbons v. *Ogson*, 6 Wheat 1, 6 LEd. 23 (1924)	4
Perez v. *United States*, 402 U.S. 146 (1971)	4
United States v. *Dahms*, 938 F.2d 131 (9th Cir. 1991)	5
United States v. *Darby*, 312 U.S. 100 (1941)	4
United States v. *Driscoll*, No. 91-1583, 1992 U.S. App. LEXIS 16139 (6th Cir. July 16, 1992)	5
United States v. *Gomez*, 911 F.2d 219 (9th Cir. 1991)	5
United States v. *Sherbondy*, 865 F.2d 996 (9th Cir. 1988)	4
Constitutional and Statutory Provisions:	
Article I, Section 8, United States Constitution ...	2
14th Amendment, United States Constitution	2
18 U.S.C. §921(a)(20)	5
18 U.S.C. §922(g)(1)	2, 3, 5
18 U.S.C. §924(e)(1)	3, 5, 6
Federal Rule of Criminal Procedural 11(e)(1)(B) ..	2
Kentucky Constitution,§145(1), 150	5
Kentucky Revised Statutes Annotated §29A.080	5
Kentucky Revised Statutes Annotated §527.040(1)	5

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IN THE

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JOHN THOMAS LYNCH - - - - - - - *Petitioner*

v.

UNITED STATES OF AMERICA - - - - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, John Thomas Lynch, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit rendered September 8, 1992.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit affirming the conviction and sentence of the Petitioner, John Thomas Lynch, was filed on September 8, 1992 and issued as mandate on September 30, 1992 and was not published. A copy of the above-mentioned opinion and mandate are attached hereto.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are Article I, Section 8 (To regulate Commerce . . . among the several States) and the 14th Amendment (denial of equal protection of the law).

STATEMENT OF THE CASE

On April 1, 1991, a federal grand jury sitting for the Western District of Kentucky at Louisville returned an Indictment charging the Petitioner, John Thomas Lynch ("Lynch"), with possession and sale of a Schedule II controlled substance on September 25, 1990 and possession and sale of a firearm on September 26, 1990. As to the latter Count of the Indictment, Lynch, a previous convicted felon, was charged with possessing a firearm in violation of 18 U.S.C. §922(g)(1). (R. 1: Indictment)

On April 4, 1991, Lynch was brought before the Court pursuant to an arrest warrant and was subsequently detained. (R. 6 and 8; Orders of the Court).

On August 19, 1991, Lynch entered a plea of guilty by agreement pursuant to Federal Rules of Criminal Procedure, Rule 11(e)(1)(B). By the agreement, the drug charges were dismissed against Lynch, and his plea was to the possession and sale of a firearm in violation of 18 U.S.C. §922(g)(1). The case was continued until November 25, 1991, for sentencing. (R. 22, 23, 24 and 25: Plea Agreement and Order).

On November 25, 1991, the Court determined that Lynch was an Armed Career Criminal pursuant to 18 U.S.C. §924(e)(1) and sentenced him a 180 month sentence. (R. 36: Order).

Lynch filed a Notice of Appeal for appeal to the United States Court of Appeals for the Sixth Circuit on December 18, 1991 due to the determination that Lynch was an Armed Career Criminal pursuant to and the application of 18 U.S.C. §924(e)(1).

The facts of the case are quite simple. After accompanying a friend to a pawn shop in Louisville, Kentucky, on September 25, 1990 (which was an undercover sting operation by the Bureau of Alcohol, Tobacco, and Firearms agents with local authorities) to sell an informant forty tablets of dilaudid, Lynch was asked if he had any firearms to sell. The next day he brought a rifle which had belonged to his father and had been in the family over thirty years and sold it for eighty dollars. The rifle was not stolen, had never been used in a criminal act and remained in his home and the family possession for over thirty years. For this possession and sale Lynch received a fifteen year sentence pursuant to 18 U.S.C. §924(e)(1).

REASONS FOR GRANTING THE WRIT

The sentencing of Lynch to 15 Years for Violating 18 U.S.C. §922(g)(1) is an Unconstitutional Application of This Law Under the Facts of This Case.

I.

18 U.S.C. §924(e)(1) provides that in the case of a person who violates 18 U.S.C. §922(g)(1) and has three previous convictions by any court for a violent felony offense, such person shall be imprisoned for not less than fifteen years,

and the court shall not suspend the sentence of, or grant a probationary sentence to such person. There is no dispute to the fact that Lynch has three previous convictions for a violent felony offenses. He was convicted of armed robbery and of trafficking in a controlled substance in 1974, of robbery in 1981, and of burglary, receiving stolen property and transportation of a stolen motor vehicle in 1984. He has also had a series of shoplifting charges since 1987, upon his release from prison. (R. 1: Indictment)

18 U.S.C. §922(g) requires a connection to interstate commerce. In this case that connection is missing or at best, is too remote. The firearm in this case remained in Lynch's family for over thirty years and the transaction which occurred took place in the county in which he has lived all his life. This rifle was not transported or received through interstate of foreign commerce. See *United States* v. *Sherbondy*, 865 F.2d 996, 999, 1000 (9th Cir. 1988). Beginning with *Gibbons* v. *Ogden*, 6 Wheat 1, 6 LEd. 23 (1824) to *United States* v. *Darby*, 312 U.S. 100 (1941) to the present day, the commerce power has expanded jurisdiction of the Congress to reach to distant acts from the commerce itself before it leaves and after it arrives at it's points of travel. However, in this case, one would have to reach back over thirty years to find such a connection. It is respectfully submitted that Justice Stewart's dissent in *Perez* v. *United States*, 402 U.S. 146 (1971) would carry the day in the case at bar. In *Perez*, Justice Stewart wrote:

> Congress surely has the power under the Commerce Clause to enact criminal laws to protect the instrumentalities of interstate commerce, to prohibit the misuse of the channels or facilities of interstate commerce, and to prohibit or regulate those interstate activities that have demonstrably substantial effect

on interstate commerce. But under the statute before us a man can be convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or facts showing that his conduct affected interstate commerce. I think the Framers of the Constitution never intended that the National Government might define as a crime and prosecute such wholly local activity through the enactment of federal criminal laws.

II.

The application of 18 U.S.C. §922(g) depends on how a state treats felons in the restoration of their civil rights. 18 U.S.C. §921(a)(20) states that "any conviction which has been expunged, or set aside for which a person has had civil rights restored shall not be considered a conviction for the purpose of this chapter. 18 U.S.C. §921(a)(20) defines conviction as it is used in 18 U.S.C. §922(g)(1).

For example, Michigan restores a felon's rights to vote and hold public office at the conclusion of his incarceration. Therefore, in Michigan, a felon may have more previous violent felony convictions than Lynch, but if he or she has served out the sentence, those convictions do not count when applying 18 U.S.C. §924(e)(1). Since Lynch lives in Kentucky, which does not restore civil rights except by executive pardon, he is treated differently than felons in Michigan and is not given equal protection of the law. Ky. Const. §145(1), 150; Ky. Rev. Stat. Ann. §29A.080(2)(e)(3) and Ky. Rev. Stat. Ann. §527.040(1). See also *United States* v. *Dahms*, 938 F.2d 131, 133 (9th Cir. 1991); *United States* v. *Gomez*, 911 F.2d 219, 221 (9th Cir. 1990) and *United States* v. *Driscoll*, No. 91-1583, 1992 U.S. App. LEXIS 16139 (6th Cir. July 16, 1992) which reverses the *Dahms* case.

Idaho also restores civil rights in much the same fashion as Michigan.

If Lynch had lived in these places and others which restore civil rights as they do, he would not have received his fifteen year sentence because his three previous violent felony offenses would not have counted since he had served out his sentences.

CONCLUSION

The purely local nature of Lynch's involvement with the rifle he sold and the unequal treatment of convictions for enhancing sentences make Lynch's fifteen year sentence under 18 U.S.C. §924(e)(1) unconstitutional.

Respectfully submitted,

ARTHUR R. SAMUEL
BROADUS AND SAMUEL
1808 One Riverfront Plaza
Louisville, Kentucky 40202
Counsel for Petitioner

CERTIFICATE OF SERVICE

I, Arthur R. Samuel, counsel for Petitioner, certify that the attached Petition for Writ of Certiorari was served on the Respondent by depositing copies of the aforementioned documents in the United States mail, first class postage prepaid, on December 4, 1992, addressed to Respondent's counsel, Hon Randy Ream, Assistant United States Attorney, 510 W. Broadway, 10th Floor, Louisville, Kentucky 40202.

ARTHUR R. SAMUEL
BROADUS AND SAMUEL
1808 One Riverfront Plaza
Louisville, Kentucky 40202
Counsel for Petitioner

APPENDIX

NOT FOR PUBLICATION

No. 91-6434/91-6497

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, - - - *Plaintiff-Appellee,*

v.

GROVER W. BOOTH and
JOHN THOMAS LYNCH, - - - *Defendant-Appellant.*

On Appeal From the United States District Court
for the Western District of Kentucky

ORDER—Issued September 30, 1992

BEFORE: NELSON, NORRIS, and SUHRHEINRICH, Circuit Judges.

I

PER CURIAM. In 1990 the Bureau of Alcohol, Tobacco, and Firearms along with local authorities in Lexington, Kentucky, established a pawn shop as part of an undercover sting operation. On September 25, 1990, Grover Booth and John Thomas Lynch met an informant at the pawn shop to sell the informant forty tablets of dilaudid. After the sale was completed, the undercover officers in the store mentioned that they would be interested in purchasing firearms. the following day, Lunch returned with a .308 caliber rifle, which he sold to the undercover agents for

eighty dollars. The two were subsequently arrested. Lynch was charged with possession with intent to distribute dilaudid, conspiracy to possess with intent to distribute dilaudid, and with being a felon in possession of a firearm. He pled guilty to the firearms charge and the drug charges were dropped. At sentencing, the district court determined that he was an armed career criminal and enhanced his sentence pursuant to 18 U.S.C. §924(e)(1). Lynch now challenges the indictment charging him with the firearms violation and the constitutionality of the Armed Career Criminal Act. Booth was charged with possession with intent to distribute dilaudid and conspiracy to possess with intent to distribute dilaudid. He pled guilty to the first charge and the second was dropped. He now challenges the sentence imposed after his guilty plea. We affirm the district court in all respects as to both Lynch and Booth.

II

Lynch pled guilty to violating 18 U.S.C. §922(g)(1), which makes it a crime for one "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm or ammunition." Lynch contends that his conviction was improper because he was restored to his civil liberties, which under 18 U.S.C. §921(a)(20) immunizes him from section 922.

It is undisputed that Lynch "has been convicted . . . of a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. §922(G)(1). He claims that he "has had [his] civil rights restored" under state law, within the meaning of section 921(a)(20). By enacting this section, Congress intended to allow the states to determine whether a particular felon presents a "potential for serious unlawful activity," thereby subjecting him to the restrictions of section 922, by deciding whether to restore the felon's civil rights. *United States* v. *Cassidy*, 899 F.2d 543, 547-49 (6th Cir.

1990). We look to the whole of state law to determine whether a felon's civil rights have been restored. *Id.* at 546. Specifically, we look to whether the defendant is entitled to vote, hold public office, serve on a jury, and possess a firearm. *Id.* at 549. To satisfy section 921(a)(20), these rights need not be restored in full, but their restoration must more than de minimis. *Id.*

Lynch's criminal history includes several felony convictions in the Commonwealth of Kentucky. He was convicted of armed robbery and trafficking in a controlled substance in 1974, of robbery in 1981, of burglary, receiving stolen property, and transportation of a stolen motor vehicle in 1984, and of theft in 1989. As a result of his prior felony convictions, Lynch forfeited various rights, including the right to vote, Ky. Const. §145, the right to hold public office, Ky. Const. §150, the right to sit on a jury, Ky. Rev. Stat. Ann. §29A.080, and the right to possess a handgun, Ky. Rev. Stat. Ann. §527.040. These disabilities may only be removed by an executive pardon. Ky. Const. §§145(1), 150; Ky. Rev. Stat. Ann. §§29A.080(2)(e), (3); Ky. Rev. Stat. Ann. §527.040(1). Lynch has presented no evidence that he has received an executive pardon or has otherwise been restored to any of these civil rights. Therefore, he is not covered by the section 921(a)(20) exception to section 922. *See Cassidy*, 899 F.2d at 549.

Lynch submits that *United States* v. *Dahms*, 938 F.2d 131 (9th Cir. 1991), compels reversal of his conviction. This is unavailing. First, *Dahms* was repudiated by this circuit in *United States* v. *Driscoll*, No. 91-1583, 1992 U.S. App. LEXIS 16139 (6th Cir. July 16, 1992) (publication pending). Second, *Dahms* involved Michigan law, which restores the felon's rights to vote and hold public office at the conclusion of the felon's incarceration. Kentucky has no such statute and, unlike the felon in *Dahms*, Lynch was never restored to any of these rights.

Lynch also argues that Kentucky law did not prevent him, as a felon, from possessing a rifle. Thus, he concludes, his civil right to possess such a weapon was "restored." This is unpersuasive. Section 922(g) applies to all convicted felons in possession of a firearm, which plainly includes Lynch. Section 921(a)(20) only exempts those felons whose civil rights have been restored under state law. Hence, we do not look to Kentucky law to determine whether the Commonwealth prohibited Lynch from possessing a rifle. Instead, we inquire only whether the Commonwealth has substantially restored Lynch's civil rights, and thereby whether Kentucky regards Lynch as a person who poses a potential for serious unlawful activity. *Cassidy*, 899 F.2d at 547-49. The Commonwealth has not restored Lynch's civil rights. Therefore he was properly held subject to section 922(g)(1). *Driscoll*, 1992 U.S. App. LEXIS at *25-*28.

III

Lynch next contends that his sentence under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. §924(e)(1), constitutes cruel and unusual punishment in violation of the Eighth Amendment. This circuit has already held that the ACCA does not violate the Eighth Amendment's proscription of cruel and unusual punishment *United States* v. *Pedigo*, 879 F.2d 1315, 1320 (6th Cir. 1989). Lynch is a hopeless recidivist. From the time he turned eighteen to the time of his arrest on the present charges at age forty, Lynch has amassed at least seventeen misdemeanor and felony convictions. Lynch will not be heard to complain that the sentence he received after compiling such a record was cruel and unusual. *Id.*[1]

[1]Lynch raised several other arguments for the first time at oral argument. As they have not been briefed, we will not consider them. *Reithmiller* v. *Blue Cross and Blue Shield*, 824 F.2d 510,511 n.12 (6th Cir. 1987).

IV

On November 2, 1989, Booth took part in a sale of dilaudid. On September 25, 1990, Booth sold forty dilaudid tablets to a Bureau of Alcohol, Tobacco, and Firearms informant. On November 9, 1990, Louisville police searched Booth's residence and found dilaudid, valium, and paraphernalia. Charges based on the first and third of these episodes were brought in state court. On March 19, 1991, Booth pled guilty and received a one year prison sentence on the first episode and a ten year sentence on the third. The sentences were ordered to run consecutively. Booth was charged in federal court with the September 25 conduct. Again, he pled guilty and was sentenced on December 4, 1991 to twenty-seven months imprisonment to run consecutively with his state sentences. Booth claims that the district court erred in ordering this sentence to run consecutively rather than concurrently with his state sentences.

Booth's argument is limited to the contention that the district court was required to apply U.S.S.G. §5G1.3(b). Subsection (b) would require that Booth receive concurrent sentences if the sentences "resulted from offense(s) that constituted part of the same course of conduct . . . and have been fully taken into account in the determination of the offense level for the instant offense." Booth contends that the three episodes were part of the same course of conduct. Assuming arguendo that this is the case, the state convictions were not taken into account in determining Booth's offense level. Nor were they included as relevant conduct. In fact, they were not even used to increase Booth's criminal history score. As such, subsection (b) does not apply here, and the district court properly refused to sentence Booth under it. *See* U.S.S.G. §5G1.3 application note 2.

Subsection (c) provides that "[i]n any other case, the sentence for the instant offense shall be imposed to run

consecutively to the prior unexpired term of imprisonment to the extent necessary to achieve a reasonable incremental punishment for the instant offense." U.S.S.G. §5G1.3(c). The district court did not err in imposing Booth's sentence under this subsection.

V

For the foregoing reasons, the conviction and sentence of John Thomas Lynch is affirmed and the sentence of Grover Booth is affirmed.

A True Copy
Attest:
Leonard Green, Clerk
/s/ By Diane Schnur
Deputy Clerk